Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-1942

In The

Supreme Court of the United States

October Term, 1992

HOZELOCK, LTD.,

Petitioner,

vs.

ALAN RAY COX,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES O. PEED
Counsel of Record
Attorney for Respondent
200 West First Street
Winston-Salem, North Carolina 27101
(919) 750-0800

Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the North Carolina Court of Appeals and North Carolina Supreme Court properly upheld the trial court's determination that it had personal jurisdiction over the petitioner under the stream of commerce theory regardless of which approach is followed?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 3

I. The North Carolina Court of Appeals and Supreme Court did not depart from established precedent in upholding the trial court's determination that it had personal jurisdiction..... 4

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987) 4, 7, 8, 9, 10

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 761, 444 U.S. 297 (1961)..... 6

Hanson v. Denckla, 357 U.S. 235 (1958)..... 6

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 9

Contents

Page

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 4, 5, 6, 7, 9, 10

No. 91-1942

In The

Supreme Court of the United States

October Term, 1992

HOZELOCK, LTD.,

Petitioner,

vs.

ALAN RAY COX,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Cox was injured in February 1987 by a garden water pressure sprayer manufactured by petitioner Hozelock. Petitioner is an English company that designs, manufactures, distributes and maintains hundreds of products including a water pressure sprayer known and designed as "Polyspray or

Polyspray2" (App. 1a-2a).[1] Such products are sold throughout the world, including substantial sales in the United States (App. 1a-2a). Petitioner sold products to three distributors in the United States: the Geiger Corporation, the True Temper Corporation, and Melnor Industries (App. 24a).

Hozelock manufactured approximately 300,000 sprayers per year of the type involved in the respondent's injury. Approximately 32,100 of the type of sprayer involved in the respondent's injury were sold by the petitioner to two Pennsylvania distributors, the Geiger Corporation and the True Temper Corporation (App. 1a-2a). More specifically, the particular sprayer that injured the respondent was one of approximately 15,000 such sprayers made by the petitioner and sold to the Geiger Corporation during the period of January 1, 1985 through January 1, 1988 (App. 24a).

Petitioner Hozelock is aware that the Geiger Corporation is a wholesale distributor who buys goods from Hozelock and resells those goods to retail stores in the United States (App. 24a-25a). The Geiger Corporation regularly sold Polyspray sprayers manufactured by Hozelock to Piedmont Garden Supply, a retail store in Salisbury, North Carolina. They sold approximately three dozen sprayers per year since 1986 to Piedmont Garden Supply. Piedmont Garden Supply purchased such sprayers for resale in the ordinary course of trade (App. 2a).

Hozelock is the only manufacturer of replacement components for the Polyspray2 and regularly sells such parts to the Geiger Corporation and to the True Temper Corporation (App. 25a). Further, Hozelock states in its instruction manual that spare parts may be found at "good hardware stores and garden centres."

---

1. Citations to "App. ____" are to the Appendix to the Petition.

(Lodging App. 1a).[2] Petitioner operates a "sales and after-sales service for retailers, . . . providing support and service direct to the end user." Additionally, in the manual, Hozelock personally guarantees its sprayers "against any defect arising from faulty material or workmanship for a period of 12 months from the date of purchase" and adds further that "[t]his guarantee is in addition to and in no way detracts from your statutory rights as a consumer." (Lodging App. 2a).

Petitioner is aware that the Geiger Corporation sold to a buyer in North Caroline (App. 25a). Petitioner has made no attempt to limit the area of distribution of his product so as to exclude the State of Carolina (App. 11a). The product involved in the respondent Cox's injury is readily available to and regularly purchased by individual consumers in the state of North Carolina (App. 26a).

Respondent's employer, "A New Leaf," purchased the sprayer which caused respondent's injury from Piedmont Garden Supply of Salisbury, North Carolina. Respondent's employer had purchased all such sprayers it used prior to respondent's injury from either Piedmont Garden Supply or from the Geiger Corporation directly (App. 26a-27a). In February of 1987, respondent Cox was injured by the Polysprayer manufactured by Hozelock while using the sprayer in his capacity as an employee of A New Leaf. Respondent's eye was damaged to such an extent that it had to be removed (App. 3a).

REASONS FOR DENYING THE WRIT

Petitioner argues that there is a conflict among the state courts and the circuit courts concerning the proper application of the

---

2. Copies are reproduced in Respondent's Lodging Appendix which is submitted with this brief under separate cover.

stream of commerce theory. Further, petitioner argues that the conflict should be resolved with this case. However, petitioner disregards the fact that the stream of commerce theory was properly applied in this case and that the trial court's decision upheld by the North Carolina Court of Appeals and Supreme Court is consistent with federal due process. That being the case, there is no issue worthy of review before this Court and the petition for review should be denied.

I.

THE NORTH CAROLINA COURT OF APPEALS AND SUPREME COURT DID NOT DEPART FROM ESTABLISHED PRECEDENT IN UPHOLDING THE TRIAL COURT'S DETERMINATION THAT IT HAD PERSONAL JURISDICTION.

The North Carolina Court of Appeals and Supreme Court correctly held in this case that the exercise of jurisdiction was proper by relying upon the language in the Court's decisions in *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) and the later case of *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987). In *World-Wide,* the Court stated that a court's exercise of personal jurisdiction over a foreign defendant is consistent with constitutional notions of due process and fairness where the foreign defendant injected his products into the stream of commerce. In *Asahi,* the Court validated the stream of commerce theory and determined the balancing factors that are important to traditional notions of fair play and substantial justice.

In the *World-Wide* case, plaintiffs were New York residents who purchased an Audi automobile from a New York retailer. Following an accident in Oklahoma, plaintiffs sued the New York retailer and the New York wholesaler in an Oklahoma court. The

Court ruled that the Oklahoma courts did not have the power to exercise personal jurisdiction over the defendants where the only connection with the forum state was "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *World-Wide Volkswagen v. Woodson* at 295. The Court made an important distinction in the *World-Wide* case, stating that the consumer's transport of the product to the forum state, by itself, cannot form the basis of personal jurisdiction. *Id.* at 298.

While the Court recognized that it was foreseeable that an automobile sold elsewhere could reach the forum state, the Court noted that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause." *Id.* at 295. The Court was very careful to note that:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297. By way of explaining when a corporation could reasonably anticipate being haled into court in a particular state, the Court went on to say:

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen v. Woodson at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235 (1958)).

Finally, the Court described what sort of activities a corporation could engage in that would constitute purposefully availing itself of the privilege of conducting activities within a forum state by saying:

> If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Compare Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 761, 444 U.S. 297-298 (1961).

In the case at bar, Hozelock's activities are precisely what the *World-Wide* Court described. Hozelock purposefully availed itself of the privilege of conducting activities in North Carolina by placing its product into the stream of commerce with the reasonable expectation that it would be purchased by consumers in North Carolina. Further, Hozelock sold its sprayers as well as hundreds of other products to three major national distributors in the United States who resell the products to retail stores throughout the United States, including in North Carolina.

Respondent Cox was injured by one of those thousands of products in the state of North Carolina.

Although the *World-Wide* Court defined the stream of commerce theory, it did not apply it in that case. However, the facts of the *World-Wide Volkswagen* case are distinguishable from the case at bar in that the product involved in the *World-Wide* case reached the forum state because the consumer drove the product there after he had purchased it. In the case at bar, the product was purchased in the forum state and reached the forum state through the normal channels of distribution in the ordinary course of trade. Therefore, the stream of commerce theory would apply to these facts.

Petitioner would concede that the language of the *World-Wide* Court presents a strong argument that the stream of commerce theory should be applied to the present facts but argues that the later case of *Asahi Metal Industry Co. v. Superior Court of California* would alter the application of the stream of commerce theory. In *Asahi*, a California resident was injured when he lost control of his motorcycle which contained an allegedly defective valve manufactured by Asahi, a Japanese corporation. The complaint named both Asahi and the tire manufacturer, Cheng Shen, a Taiwan corporation. Cheng Shen cross-complained against Ashahi for indemnification. The injured California resident later settled his claims with the defendants leaving the cross-claim between the two foreign defendants in the California court.

The *Asahi* Court quoted extensively from the *World-Wide Volkswagen v. Woodson* decision and found the stream of commerce theory of minimum contacts to be a valid basis for the exercise of personal jurisdiction. *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102 at 109-110. The Court noted that there had been a number of cases since the *World-Wide* decision where the petitioner corporation did nothing to

purposely avail itself of the market in the forum state other than to place its product into the stream of commerce. *Asahi* at 110. The Court, however, was evenly split on the question of whether placing a product into the stream of commerce, without more, was a sufficient basis for jurisdiction over a foreign defendant. Absent a majority decision on the issue, *Asahi* does not stand for the proposition that a foreign defendant must do something more than place its product into the stream of commerce in order to subject itself to the jurisdiction of a forum state's courts where its product is sold there and causes an injury.

However, the split in the Court seems to parallel the split in the circuit courts. Four of the justices, led by Justice O'Connor, did believe that some further action of the defendant other than merely placing its product into the stream of commerce was necessary to support jurisdiction by the forum state. They would require some additional conduct on the part of the defendant directed toward the forum state. Although this view is the minority approach to the stream of commerce theory among the federal courts of appeal, as noted by Justice Brennan's opinion in *Asahi*, 480 U.S. at 118, even applying this stricter approach to the case at bar, the Court would find that there was personal jurisdiction in the present case.

Petitioner's name appeared directly on the product and in manuals and pamphlets included with the product. In fact, Hozelock made personal warranties and representations directly to the consumer and provided service direct to the consumer. Further, petitioner was aware that its products were sold in North Carolina in the ordinary course of trade and made no effort to limit the area of distribution of its products. These contacts and others are sufficient to fulfill the requirement that the petitioner must have done more than just place its product into the stream of commerce. Therefore, regardless of whether there is a conflict in the circuit courts or not, this case would be decided the same

under both approaches and it would not be the proper case to settle the alleged conflict within the circuit courts. The petition for review should be denied.

Furthermore, eight of the justices concurred in the holding in *Asahi* that the exercise of personal jurisdiction over Asahi in that case would " 'offend traditional notions of fair play and substantial justice.' " *Asahi* at 113 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). However, the Court did not base its holding on whether or not placing a product in the stream of commerce was a sufficient ground for the forum state to find jurisdiction. Instead, the Court examined the burdens on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. *Id.* The Court also considered "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies." *Asahi* at 113 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)).

Looking at these factors, the Court found that although the burden on the defendant to defend in a foreign judicial system was substantial, "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* at 114. But in that case, the interests of the plaintiff and the forum were slight. *Id.*

The Court noted that since "the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished." *Id.* The Court also observed that it was not at all clear whether California law should govern a dispute between foreign corporations regarding a transaction made in Japan and a shipment of goods from Japan to Taiwan. *Id.* at 115. The court concluded that the burden on the defendant

outweighed the slight interests of the plaintiff and the forum state and the exercise of personal jurisdiction "in this instance would be unreasonable and unfair." *Id.* at 116.

The case at bar differs from *Asahi* with respect to three decisive points. First, the respondent is a North Carolina resident, whereas in *Asahi*, neither of the litigants were even United States citizens or entities. Second, North Carolina substantive law is applicable, whereas it was not clear in *Asahi* whether California law would even apply to two foreign corporations. Finally, the petitioner is the party who placed its goods into the stream of commerce by selling them to distributors in the United States whereas the transaction and shipment of goods between the parties in *Asahi* occurred completely outside the United States and the manufacturer of the defective part did not place the product into the stream of commerce in the United States. Thus, the factors that led the *Asahi* Court to conclude that the exercise of jurisdiction over the petitioner would be unfair and unreasonable are not present in the case at bar. Indeed, in the case at bar, those same balancing factors weigh in favor of the forum state's exercise of personal jurisdiction over the petitioner.

This Court has already upheld the stream of commerce theory as a valid basis for determining personal jurisdiction over a foreign defendant. Further litigation on a matter which is already decided would be a waste of this Court's valuable time and resources. Although both the consuming public and foreign non-resident businesses are affected in situations such as the case at bar, the potential plaintiffs already realize they may sue manufacturers of products which injure a person when such a product was introduced by the manufacturer into the stream of commerce based on the decisions in *World-Wide Volkswagen* and *Asahi*. Regardless of which approach to the stream of commerce theory is applied in the present case, the court has jurisdiction. Therefore, this case is not a suitable case for this Court to test the stream of commerce theory.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES O. PEED
Counsel of Record
Attorney for Respondent